No. 86-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, *et al.*,
Appellants,

v.

ROTARY CLUB OF DUARTE, *et al.*,
Appellees.

Appeal from the Court of Appeal of the State of California, Second Appellate District

BRIEF OF THE AMICUS CURIAE IN SUPPORT OF APPELLANTS BY THE CONFERENCE OF PRIVATE ORGANIZATIONS

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The Conference of Private Organizations respectfully submits this brief as amicus curiae in support of the appellants, the Board of Directors of Rotary International, et al.

INTEREST OF AMICUS

The Conference of Private Organizations ("CONPOR") is a coalition of national, private membership organizations.[1] CONPOR was formed in order to defend and protect the fundamental rights of its members, and citizens generally, to associate freely and privately upon such terms as they shall solely determine. CONPOR promotes this right by participating in judicial cases, providing information to legislative and administrative officials, and conducting educational activities.

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[1] The following organizations are members of CONPOR: the Benevolent and Protective Order of Elks, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,650,000 members; the Loyal Order of Moose, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,300,000 members; the Great Council of U.S. Improved Order of Red Men, a benevolent, ritualistic, and fraternal society that charters approximately 940 local lodges, which have approximately 53,616 members; Kiwanis International, a social and service organization that charters approximately 8,200 local Kiwanis clubs with approximately 313,000 individual members; the National Club Association, whose membership consists of over 1,000 private social clubs which have 1,000,000 individual members; the National Association of American Business Clubs, whose membership consists of 136 private clubs, which have over 6,600 individual members; and the United States Power Squadrons, whose membership consists of 450 local groups, which have over 50,000 members.

CONPOR's interest in this case arises from the diversity of membership requirements, limitations, and restrictions of the organizations which it represents. Some of these organizations limit their membership primarily on the basis of broad, objective classifications such as gender, age, religious belief, or literacy. Others rely primarily on subjective membership qualifications such as congeniality, avocation, social status, or economic status. Most employ both types of restrictions to one degree or another. CONPOR believes that the constitutional right of association protects the right of its membership associations to be selective in their core membership functions—voting, holding office, and making policy—on the basis of either broad, objective classifications such as gender, or on the basis of subjective factors such as congeniality, social status, or the like. Each of these membership policies represents a choice that is within the discretion of the group's members and may not be subject to government control.

All of the associations CONPOR represents contribute to the unique pluralism and diversity of our country. Because the decision of the Court of Appeal in the instant case threatens the constitutional rights of these private organizations, CONPOR believes this Court should reverse that decision.

SUMMARY OF ARGUMENT

This case does not call upon the Court to decide whether Rotary clubs should reconsider their current membership policy and decide to admit women. Nor does it call upon the Court to decide whether Rotary International, an organization whose members are local Rotary clubs, qualifies for constitutional protec-

tion. The question in this case is whether the State of California may interfere with the membership decision of men who join together in selective, small, congenial groups to render service in fellowship with one another.

In light of the factors the Court discussed in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the answer to that question must be no. The Jaycees does not follow a truly selective membership admission policy, admitting virtually all male applicants between the ages of 18 and 36. It actively recruits new members on the local, regional, and national levels. It is a large organization that is controlled at the national level. In addition, the Jaycees admit nonmembers to many of the functions central to the decision of its members to join the organization. Given these characteristics, it is obvious that the Jaycees falls well outside the boundaries of the constitutional protection of intimate association.

Rotary clubs, on the other hand, are selective, small, and governed by local members. Rotary meetings are private, and the only way to be admitted to the membership of a club is by invitation after a careful screening process. Rotary clubs exist so their members can render community service in fellowship with one another. There is an explicit policy against using membership for commercial advantage. These characteristics of Rotary clubs indicate that their members have a constitutionally protected freedom of intimate association.

In its attempt to extend to Rotary clubs the Unruh Act's[2] prohibition of discrimination in business estab-

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[2] The Unruh Act, Cal. Civil Code §51 (West 1982), says:

lishments, the Court of Appeal of the State of California has violated this constitutional right. In addition, the Court of Appeal has forced many members of Rotary clubs to be associated with a viewpoint to which they object—a violation of the First Amendment. It has also forced these Rotary members to choose between their right of free speech and their right of intimate association. If our constitutional rights mean anything, then the State may not force such a choice on its citizens. Because of these violations of Rotary members' constitutional rights, the Court should reverse the decision of the Court of Appeal of the State of California.

ARGUMENT

I. CALIFORNIA MAY NOT INTERFERE WITH THE MEMBERSHIP DECISIONS OF ROTARY CLUBS BECAUSE THE CONSTITUTION PROTECTS ROTARY MEMBERS' CHOICES OF THEIR INTIMATE ASSOCIATES.

The Constitution protects local Rotary clubs from undue intrusion by the State, because those clubs are congenial, small and selective in their membership decisions. Like the members of many other private organizations, Rotary members join with other people of their choosing for fellowship and to serve society. Rotary clubs restrict their membership to men, in part because the fellowship that develops among a

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"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

group of men who meet regularly enables them to serve the community more effectively. Pigman deposition, App. to Jur. Statement G44. Relationships such as these safeguard "the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Accordingly, the Court should protect the right of Rotary members to choose the people with whom they enter into such relationships "as a fundamental element of personal liberty." 468 U.S. at 618.

In *Roberts*, the Court listed factors to determine how much the Constitution protects the membership decisions of private groups. These factors include "size, purpose, policies, selectivity, [and] congeniality," with no single factor being determinative. 468 U.S. at 620. The Court did not have to mark the boundaries of constitutional protection in *Roberts* in order to conclude that the Jaycees' membership decisions are not protected. Whatever these boundaries are, it is clear that the Jaycees have been held to fall outside them. 468 U.S. at 620. Rotary clubs, however, as well as many other private organizations, fall within these boundaries.[3]

In contrast to the California Court of Appeal, which focused its analysis in this case on Rotary International, this Court in *Roberts* focused on the local Jaycees chapters involved in the case. Those local chapters were large and basically unselective groups.

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[3] CONPOR notes that the criterion of organizational "size" is imprecise and leaves several major questions unanswered (e.g., what is the effect of organizational subgroups of differing sizes within an organization). Whatever the resolution of these factors, however, Rotary clubs clearly satisfy any size criterion.

Age and gender were the only membership criteria used at the local and national levels, and the Jaycees admitted women as associate members. Furthermore, people of both genders who were not members of the Jaycees often participated in activities central to the decision of many members to associate with one another, including awards ceremonies, community programs, and recruitment meetings. 468 U.S. at 621.

Local Rotary clubs are different. The primary purpose of Rotary is to encourage fellowship and service among men who are representative of the local community. 1 Rotary Basic Library, Focus on Rotary 1-2. An individual Rotary member belongs to a local Rotary club. These clubs, not their individual members, are members of Rotary International. In 1982, the average membership of a local club was forty-six. *See Rotary Club of Duarte v. Board of Directors of Rotary Int'l*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, 216 (1986).

Membership in Rotary clubs is by invitation only and is highly selective. Rotary clubs use a classification system of businesses and professions. An active member must be in a leadership position in the business or profession in which he is classified, and the number of members in each classification is limited. 1 Rotary Basic Library, Focus on Rotary 1-2, 67; *Rotary*, 224 Cal. Rptr. at 217; Pigman deposition, App. to Jur. Statement G49. Rotary club meetings are not open to the public, and joint meetings with other service clubs are discouraged. In fact, Rotary members are urged not to belong to other service clubs. Women's clubs may not use the Rotary name or become members of Rotary International. 1 Rotary Basic Library, Focus on Rotary 67-68; Pigman dep-

osition, App. to Jur. Statement G25; 1981 Manual of Procedure, 135, 155-56.

In order for someone to become a member of a Rotary club, the club's membership committee or an active, senior active, or past active member must submit his name to the club's board of directors. The board forwards the nomination to the club's classification and membership committees. The former determines that the club has an open classification that accurately describes the nominee's business or profession. The membership committee evaluates the nominee's character, business and social standing, and general eligibility. To avoid embarrassment, the nominee's name is kept confidential during these preliminary evaluations, and the nominee is not informed of the investigations. If both committees return favorable reports and the board approves them, all the members of the club receive notice of the nominee's name and business. If no one objects within ten days, the nominee becomes a member. If there is an objection, the board of directors may vote to admit the nominee to membership. 2 Rotary Basic Library, Club Service 15.

One factor that influenced the Court's decision in *Roberts* was the control the Jaycees national headquarters exercised over local Jaycees chapters. *See Roberts,* 468 U.S. at 613-14. Rotary International does not exercise such control over local Rotary clubs. Each local club is run by its board of directors, which the members elect. 1 Rotary Basic Library, Focus on Rotary on 70.

Another important factor in the *Roberts* decision was the conclusion of the Minnesota Supreme Court, which this Court accepted, that the Jaycees organi-

zation was a business that sold goods and extended privileges in exchange for annual membership dues. *Roberts*, 468 U.S. at 616. The same cannot be said of Rotary clubs.

Those who are in favor of government forcing private clubs to admit women make much of the claim that membership in an organization like Rotary bestows business benefits so indispensible to careers that membership must be made available to all. *See e.g.*, *Rotary*, 224 Cal. Rptr. at 224-25. This allegation, however, is not supported by either facts or logic. It rests either on the perception that members of private organizations must receive some business benefit, or on the statements of a few members that suggest they joined the organization to obtain such a benefit. *See Rotary*, 224 Cal. Rptr. at 225-26. Neither is a sound basis for this Court or any court to render a decision, especially when the decision may infringe upon constitutional rights. It is a fact, not mere conjecture, that Rotary clubs do not exist to bestow commercial benefits on their members; they exist for those members to render service in fellowship with one another. The fallacy of this allegation of an indispensible nexus between organizational membership and vital career or business benefits is revealed when it is considered that nothing happens at a Rotary club (or other private organization) that is not replicated daily at a myriad of other unselective establishments, locations, or groups, and that membership in a Rotary club does not provide access to the conversations, or discussions, of other members.

When the Court applies the *Roberts* factors to Rotary clubs, it must conclude that the Constitution protects Rotary members' choices of intimate associates

from interference by the State. In *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974), the Court held that the actions the State may take against groups with selective memberships is very limited, even if these groups discriminate on the basis of race. Specifically, the Court concluded that the State may not exclude such a group from a public park merely because it has an "all-Negro, all-Oriental, or all-white" membership policy. 417 U.S. at 575. The Court quoted with approval the dissenting opinion of Justice William O. Douglas joined by Justice Thurgood Marshall (417 U.S. at 575) in *Moose Lodge No. 107 v. Irvis:*

> My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

407 U.S. 163, 179-80 (1972) (footnote omitted). Justice Blackmun in *Gilmore* explained why freedom of association should protect groups that restrict their membership:

> The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and ensures peaceful and orderly change.

Gilmore, 417 U.S. at 575.

The Court should extend to Rotary clubs the protection it describes in *Roberts:* "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. *E.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)." *Roberts*, 468 U.S. at 618. Such relationships qualify for constitutional protection because they cultivate shared ideals and beliefs, thus acting as buffers between the individual and the power of the State. *See e.g., Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (freedom to marry is a fundamental personal liberty);[4] *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion) (right of extended family to live together is constitutionally protected); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1973) (right of Amish parents to dictate education of their children according to their beliefs is constitutionally protected); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965) (state interference in procreative choices is unconstitutional); *Pierce v. Society of Sisters*, 268 U.S. at 535

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[4] *See also Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535,541 (1942).

(state may not prohibit parents from educating their children in private schools). *See also Gilmore v. City of Montgomery*, 417 U.S. at 575; *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958).

The Court also recognized that it should afford constitutional protection to intimate relations because people derive much of their emotional enrichment from close ties with others and "[p]rotecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *See, e.g, Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)." *Roberts*, 468 U.S. at 619. The Court should ensure that Rotary clubs receive the same constitutional protection, because their members share ideals and seek to form close relationships with one another.

The factors announced in *Roberts* indicate that the Court should protect Rotary clubs from California's interference in their membership decisions. Rotary clubs choose their members carefully from a limited group of people—leaders in business and in the professions. The clubs are small in size and governed by their own members. Rotary members come together to render community service in fellowship with one another, not to bestow commercial benefits on one another. They have decided to limit their mem-

bership to men because the unique bonds of fellowship they develop enrich their lives and enable them to serve their communities more effectively. Rotary members do not seek the Court's approval of their membership decisions. They ask the Court only to affirm that the Constitution protects those decisions from interference by the State. In light of its past decisions, the Court should heed that request and reverse the decision of the Court of Appeal of the State of California.

II. BY FORCING ROTARY CLUBS TO ADMIT WOMEN, CALIFORNIA HAS UNCONSTITUTIONALLY COMPELLED ROTARY MEMBERS TO BE ASSOCIATED WITH A VIEWPOINT TO WHICH THEY OBJECT AND TO CHOOSE BETWEEN THEIR FREEDOM OF INTIMATE ASSOCIATION AND THEIR FREEDOM OF SPEECH.

As this lawsuit indicates, most Rotary members do not want to admit women to their clubs. Proposals to change the rule that limits membership to men were defeated in 1972, 1977, and 1980. Pigman deposition, App. to Jur. Statement G41-G42. Nevertheless, the State of California has forced Rotary clubs within its boundaries to admit women as members. In doing so, it has violated the Constitution by requiring many Rotary members to make a hard choice: they must either leave their Rotary clubs, where they may have been members for many years, or they must run the risk that someone will associate them with a position to which they object—i.e., that women should be members of Rotary clubs. In other words, these Rotary members must choose between their freedom of intimate association and their freedom of speech.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (Burger, C.J.). *See also Pacific Gas and Electric Co. v. Public Utilities Comm'n*, 54 U.S.L.W. 4149 (1986) (unconstitutional for a state to require a utility to distribute in its billing envelopes literature with which it disagrees); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (statute that required newspapers to publish replies of candidates whom they had criticized held unconstitutional); *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 633-34, 642 (1943) (compulsory flag salute held unconstitutional). In *Wooley*, the Court held that New Hampshire could not prosecute Jehovah's Witnesses for covering the state motto, "Live Free or Die," on their automobile license plates. The Jehovah's Witnesses objected to the slogan on political, religious, and moral grounds. The Court held that government could not force the Jehovah's Witnesses to be the instrument for a message they found unacceptable. "In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' " *Wooley*, 430 U.S. at 715 (*quoting Barnette*, 319 U.S. at 624).

The decision of the California Court of Appeal puts many Rotary members in the same position as the Jehovah's Witnesses in *Wooley*. Until recently, these Rotary members belonged to a group of men. They invested time, money, and energy over the years to develop the reputation the Rotary name and identifying insignia convey to the public. The Rotary mem-

bership criteria are part of that reputation, including the gender restriction. Now, however, when Rotary members attend their local club meetings, wear a Rotary shirt, or do anything else connected with Rotary, some people may believe they favor admitting women to Rotary clubs. Many Rotary members do not agree with that position and do not want to be associated with it.

Most people who saw New Hampshire's motto on the Jehovah's Witnesses' license plates probably would not have assumed the Jehovah's Witnesses advocated or even accepted the philosophy of the motto. Nevertheless, the Court in *Wooley* found it sufficient that some person might connect them with the message they found unacceptable. *See* 430 U.S. at 715. Similarly, most people probably would not assume that a Rotary member advocates admitting women simply because he wears the same Rotary symbol that members of the Rotary Club of Duarte wear. All that *Wooley* requires, however, is that some person might make that assumption.

Rotary members might be able to reduce the risk of association with the objectionable viewpoint by publishing a disclaimer, but that is also inadequate under *Wooley*. The Court implicitly rejected the argument that the Jehovah's Witnesses could put a disclaimer next to the license plate. *See* 430 U.S. 714-15. Likewise, in *Pacific Gas and Electric Co.*, the Court rejected the argument that the utility would receive adequate First Amendment protection if authors of opposing viewpoints had to indicate that their messages were not those of the utility, and if the utility had the opportunity to respond to the messages. *See* 54 U.S.L.W. 4151, 4154. Government may not force

upon someone the appearance of believing something he does not in fact believe:

> The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.

Barnette, 319 U.S. at 645 (Murphy, J., concurring).

Rotary International cannot object if the men that comprise a Rotary club decide to admit a woman to their membership, so long as they do not continue to be a Rotary club or use Rotary symbols. In that case, there is no danger that someone will think other Rotary members favor altering the Rotary membership requirements. The Rotary Club of Duarte, however, wants both to admit women and to continue as a Rotary club. Rotary International responds on behalf of the many Rotary members who object to admitting women and to being associated with the position that women should be members of Rotary clubs. Rotary International does not ask the club in Duarte to disband. It only asks it not to call itself a Rotary club. The Court of Appeal decided in favor of the Duarte club, thereby violating the First Amendment rights of other Rotary members.

California may encroach on Rotary members' free speech rights if it demonstrates a compelling countervailing state interest and if that interest cannot be achieved by means less restrictive of First Amend-

ment rights. *E.g., Wooley,* 430 U.S. at 715-16; *United States v. O'Brien,* 391 U.S. 367, 376-77 (1968). California has a legitimate interest in ensuring that all of its citizens have equal access to business establishments. The legitimacy of its interest ends, however, when it tries to give all of its citizens equal access to private clubs.[5] The benefit to the public from such an encroachment is minimal, and it pales in comparison to the restriction on First Amendment rights that such an encroachment effects.

The Court of Appeal's decision not only forces Rotary members to be associated with a viewpoint to which they object; it also forces these members to choose between their freedom of intimate association and their freedom of speech. These members must either leave their local club, of which they may have been a members for years, or they must risk being associated with a position to which they object. A state's interest in eliminating discrimination cannot be so strong as to force people to make such a choice. If the government may not require a person to give up a constitutionally protected right to receive a benefit, *FCC v. League of Women Voters,* 468 U.S. 364; *Regan v. Taxation with Representation,* 461 U.S. 540, 545 (1982); *Perry v. Sinderman,* 408 U.S. 593 (1972); *Speiser v. Randall,* 357 U.S. 513 (1958), it may not

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[5] The Court of Appeals for the Third Circuit recently held that a New Jersey law prohibiting discrimination in places of "public accommodation" does not extend to Kiwanis Clubs because the Kiwanis do not invite "an unrestricted and unselected public to join as members." *Kiwanis Int'l v. Ridgewood Kiwanis Club,* Nos. 85-4306 and 85-4483, slip op. at 15 (3d Cir. 3 Dec. 1986) (Garth, J.), *rev'g* 627 F. Supp. 1381 (D.N.J. 1986).

require a person to give up one constitutional right to exercise another.

Because the decision of the Court of Appeal in the instant cases forces Rotary members to be associated with a viewpoint to which they object, and because it forces them to choose between their freedom of intimate association and their freedom of speech, this Court should reverse that decision.

CONCLUSION

According to the factors this Court announced in *Roberts,* Rotary clubs have a constitutionally protected freedom of intimate association because they are small in size, selective in membership, closed to the public in large part, and seek to foster fellowship among their members. In the name of providing women equal access to business establishments, the Court of Appeal of the State of California violated this constitutional right. It also violated the First Amendment right of Rotary members not to be associated with a viewpoint to which they object, and it forced these members to choose between their constitutionally protected rights of free speech and free association. It is appropriate for California to ensure that all of its citizens have equal access to business establishments, and the members of the Rotary Club of Duarte and of the Court of Appeal no doubt mean well when they seek to extend that principal to private clubs. What they fail to realize, however, is that one of the purposes of our Constitution is to protect people with unpopular views from coercion by the majority, even if the majority means well. As Justice Brandeis said of the drafters of our Constitution, "They conferred, as against the government, the right

to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting). Rotary clubs ask only that the State of California leave them alone. With Justice Brandeis' words in mind, this Court should reverse the decision of the Court of Appeal of the State of California.

Respectfully submitted,

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